

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





76-7021  
76-7021

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 76-7021

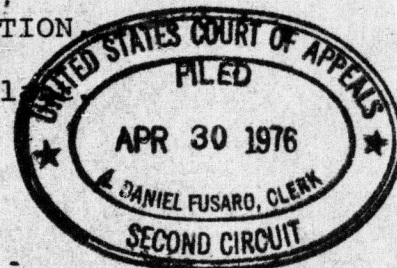
FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff-Appellee,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION

Defendant-Appellant



On Appeal from the United States District Court  
for the Eastern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

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### ISSUES PRESENTED FOR REVIEW

1. In an action for breach of contract based on defendant's failure to submit a construction bid on a military housing project for which plaintiff had prepared the architectural plans and drawings, did the trial court properly sustain plaintiff's objection to defendant's attempt to show that it was justified in not submitting a bid due to the alleged inadequacy of the plans prepared by plaintiff where (a) defendant had not pleaded the plans' alleged inadequacy as an affirmative defense, (b) the adequacy of the plans was not placed in issue by defendant's general denial, (c) defendant's own executives made no reference in their depositions and affidavits to the alleged inadequacy of the plans and (d) in answering an interrogatory which asked the reasons for defendant's decision not to submit a bid, defendant made no mention of the alleged inadequacy of the plans?

2. Did the Court properly charge the jury that it could find for plaintiff if it found that defendant's conduct reasonably led plaintiff to believe that a bid would be submitted and that plaintiff relied on that conduct by doing all the work necessary to prepare the architectural plans and drawings where there was substantial evidence to show that (a) defendant engaged in a continuous course of



conduct which led plaintiff to believe that a bid would be submitted, (b) defendant's own executives expected that a bid would be submitted, (c) defendant never advised plaintiff that it was purporting to retain the right to make a unilateral last-minute decision not to submit a bid and (d) in previous cases where it has been decided that no bid would be submitted, defendant advised plaintiff of that decision before plaintiff began work on the plans and drawings?

3. Was there sufficient evidence to support the jury's verdict of \$150,000 where (a) defendant had agreed that, in the event it was the winning bidder, plaintiff would be entitled to a fee of \$250,000, (b) on a previous project of equal size defendant had agreed that plaintiff would be entitled to a fee of 5% of the construction cost, or about \$240,000, (c) the reasonable and customary fee to which plaintiff would be entitled for its work in preparing the plans was \$208,000, (d) the customary manner by which plaintiff computes its fee is on a percentage basis similar to that utilized to compute the subject fee and (e) the reasonable and customary fee recognized in the trade for comparable projects is a minimum of 5-1/2% of the cost of construction?

4. Do any of the miscellaneous assignments of error asserted by defendant constitute reversible error:

a. Did the Court properly rule that defendant was not entitled to submit the Complaint to the jury as an exhibit where it at no time prohibited counsel from reading the Complaint to the jury?

b. Did defendant waive any claim that the Court's instructions were conflicting and irreconcilable when it failed to take any such exception to the charge at trial?

c. Was defendant prejudiced by the Court's refusal to inform counsel whether it would give an instruction, requested by plaintiff, on promissory estoppel where neither party argued for or against such a finding in the closing arguments?



### STATEMENT OF THE CASE

Plaintiff is an architectural and engineering firm located in Valley Stream, Long Island. In early 1973 it entered into an agreement with defendant National Homes Construction Company ("National") for the preparation and submission of a bid for a 200-unit family housing project at the Naval Weapons Station, Charleston, South Carolina ("the South Carolina project"). Pursuant to the agreement several meetings were held, numerous telephone conferences were conducted and plaintiff prepared a complete set of site and architectural drawings. As agreed, the plans were flown to National's home office seven days before the bidding deadline in order to allow National to confirm its subcontractor prices and complete the bid proposal. Inexplicably, National failed to submit any bid whatsoever.

Although the Complaint (A 8)\* alleged five different causes of action, plaintiff advised defendant some four weeks before trial that it would rely on only the first two claims at trial: breach of contract (Count One) and promissory estoppel (Count Two). Throughout the discovery proceedings and in its Motion for Summary Judgment which was filed only a few days prior to the date on which this case was scheduled to go to trial, defendant relied on two

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\* References preceded by "A" are to the Joint Appendix.



defenses: (1) it denied that there was ever a binding agreement between the parties requiring National to submit a bid on the South Carolina project; and (2) it claimed that no plans whatsoever reached it on March 30, 1973, the requisite seven days prior to the bidding deadline, and that it never received the plans from plaintiff until April 4th, by which time it was too late to prepare a bid (A 84-88, 91-95). Holding that both issues were questions of fact for the jury, Judge Bruchhausen denied defendant's Motion for Summary Judgment and ordered the case to trial (A 108).

The case was thereafter tried before a jury in the Eastern District of New York. After a five-day trial, the jury returned a verdict of \$150,000 in favor of plaintiff (A 761). The verdict reflects a substantial reduction from the fee which plaintiff was entitled to receive (\$250,000) in the event that National was the successful bidder (A 771). It was also less than the amount which plaintiff sought at trial (\$208,000) as the reasonable and customary value of the services which it performed on the South Carolina project (A 742).

This appeal has its genesis in defendant's unsuccessful attempt to interject during the trial a defense which had never been pleaded or alluded to in any way prior to trial. That defense is the alleged inadequacy of the architectural plans which were prepared by plaintiff.



This defense was not pled as an affirmative defense in defendant's Answer (A 14). Nor can it be deemed to have been raised by defendant's general denial since there was no allegation in the Complaint (A 8) regarding the content or sufficiency of the plans.

More significantly, this claim was not listed by defendant in its response to plaintiff's interrogatories -- which interrogatories dealt specifically with the reasons for defendant's failure to submit a bid (A 23). Nor was the alleged deficiency of the plans alluded to by any of defendant's three employees who were deposed prior to trial (E.g. Payne Dep. 95-100). In fact, the first mention of this claim was in defendant's Trial Brief (A 112) which was served on plaintiff after the jury had been chosen. Plaintiff therefore moved prior to the opening of defendant's case to exclude any evidence relating to a claim that the plans were insufficient (A 382). That motion was granted by Judge Bruchhausen (A 385) and it is that ruling which is the primary focus of defendant's appeal.

The other issues raised by defendant are relatively insignificant and warrant no more than brief attention. They deal with minor procedural questions, such as whether the Court properly sustained plaintiff's objection to defendant's attempt to have the Complaint physically submitted

to the jury, and with the sufficiency of the evidence, such as on the question of plaintiff's damages. None of these issues raises any significant question for appellate review.

#### STATEMENT OF FACTS

##### (1) The Parties' Prior Collaboration

Plaintiff's association with defendant began in March of 1971 when the parties entered into a written agreement (A 77) whereby plaintiff was to design and defendant was to construct, in the event that it was the successful bidder, student housing for the New Jersey Educational Facilities Authority. This association led to subsequent collaboration on two military housing projects for the U.S. Government. The first, involving the Naval installation at New London, Connecticut ("the New London project"), did not result in a bid (R 244-263).<sup>\*</sup> Significantly, however, National's decision not to prepare a bid was made and communicated to plaintiff before any substantial work was done by either party (see Point II, infra.)

The second project involved the Warminster Naval complex at Willow Grove, Pennsylvania ("the Warminster project"). This collaboration did result in the submission

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\* References preceded by "R" are to portions of the trial record not included in the Joint Appendix.



of a bid and, although National was not the winning bidder, its bid was a close second (A 174-176) (PX 2, A 763). As a result, various Wiedersum representatives met with National in late December, 1972, to discuss what could be done to come up with a winning bid on the next military housing project (Ibid.).

(2) The Express Agreement

It was just after the December 1972 meeting that the Navy issued a "Notice of Request for Proposals" for the South Carolina project (PX 3, A 765). After receiving this notice, plaintiff advised defendant in writing of its interest in submitting a proposal on the project and referred to the bidding methods the parties had discussed at their December meeting (PX 4, A 766). As plaintiff's letter states:

"We are interested in submitting a proposal along with National Homes for the construction of 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina. The specifications and other detailed information are being sent to our office and I will forward a copy to your office."

Mr. John Gleason, a Vice President of National, replied in writing on January 29, 1973 (PX 5, A 767):

"This is in answer to your letter of January 23 concerning 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina. National looks forward to the opportunity of submitting a proposal along with Frederic P. Wiedersum Associates on this Project."

This exchange of correspondence, even without more, clearly established an agreement between the parties to collaborate on the preparation and submission of a bid for the South Carolina project.

On its summary judgment motion, defendant attempted to refute the unambiguous language of this letter via an affidavit from Mr. Floyd Payne, the National executive who had primary responsibility for the South Carolina project. Although Mr. Payne was not the author of the letter, he argued that it merely expressed National's "interest" in the project and was not intended to be a contractual commitment (A 85).

At trial, Mr. Gleason himself took the stand and made a similar attempt to downplay the letter's significance, claiming that at the time it was written National had not made a final decision as to whether to proceed with the project (A 398-399). This contention is, of course, belied by the express language of the letter. Mr. Gleason did not say that National was merely "interested" in the project or that it might decide, at some later date, to submit a bid. On the contrary, his reply was clear and unequivocal: "National looks forward to the opportunity of submitting a proposal. . .on this Project." The jury was clearly unconvinced by defendant's attempt to "explain away" this letter.



(3) Subsequent Conduct of the Parties  
Evidencing an Agreement

In addition to defendant's January 29th letter, the jury was presented with other substantial evidence which showed beyond doubt that the parties had agreed to proceed with the South Carolina project.

On February 7, 1973, a week after Mr. Gleason's letter, plaintiff forwarded the plans and specifications (issued by the Department of the Navy) to Floyd Payne, the individual in charge of the South Carolina project for National (PX 6, A 768). Shortly thereafter Mr. Payne attended the pre-proposal conference held at Charleston, South Carolina. Since neither party felt that it was necessary for plaintiff to be present at the conference (A 186-187), plaintiff prepared a list of "considerations" for National to review at the site (PX 7; A 187-189). Mr. Payne's memorandum of the conference (PX 8) shows that there was no question in his mind about proceeding on the project; thus he states that "we should get things rolling with Wiedersum Associates."

On February 26, 1973, a week after the pre-proposal conference, the parties met at Wiedersum's office in Valley Stream. Any doubt about the existence of an agreement to submit a bid is dispelled by the events at this meeting. They were described by Mr. Albert Voorneveld, an architectural



administrator in charge of the South Carolina project for Wiedersum (A 297). After going over the plans and specifications issued by the Navy and the events that had transpired at the pre-proposal conference, the parties flatly agreed to proceed with the project. As Mr. Voorneveld testified (A 305-306):

"Q Did you discuss at this meeting whether or not you should, in fact, prepare and submit a bid on this project?

A We decided to do it. We decided and by 'we,' I say people at the meeting, National people and ourselves, that we would definitely go after the South Carolina Project."

In fact, the meeting ended with Mr. Gleason (of National) saying "Let's go and get this" (A 306).

The events following the February 26th meeting took their natural and intended course. Plaintiff first completed its work on the site plans -- drawings of the building site which indicate building locations, roads, utilities and topography (A 211-212). These plans were discussed in detail and approved by National at a meeting in New York on March 6, 1973 (PX 10, A 308-309). Following completion of the site plans, plaintiff began, and eventually completed, work on the final design plans for the project. Plaintiff had between ten and twelve people working on the plans and was in frequent communication with National during this time (A 306-307). At the same time



National was contacting suppliers and subcontractors in the Charleston area to secure price and cost estimates in order to fix a total price for the bid (Payne Dep. 67-74). On March 30, 1973 -- seven days before the bidding deadline -- plaintiff received ten sets of the completed plans from its printer and forwarded six copies to defendant (A 209-213).

(4) Delivery of the Completed Plans To  
National On March 30, 1973

As noted above, one of National's two key contentions was that it did not receive the final drawings from plaintiff in sufficient time to permit it to finalize a bid. It claimed that it told plaintiff that the drawings had to be received at least six days prior to the bidding deadline (April 6th) and that the plans were not received until April 4th (A 87). So sure of this contention was defendant that it was one of the two bases offered in support of its motion for summary judgment (A 87, 94, 104-105).

The success of this contention depended, however, on defendant's ability to get around certain documentary evidence which showed that plaintiff had sent the plans to defendant on March 30, 1973 by placing them aboard a TWA flight (PX 12; A 213-218). This evidence consisted of a TWA shipping receipt dated March 30th (A 97) and a letter of that same date from Mr. William Laverty of Wiedersum to



Mr. Arvil Duley of National (A 98). Since Mr. Laverty's covering letter merely recited that the package contained the "Bid documents" for the South Carolina project, defendant attempted to show that the phrase "Bid documents" refers to certain standard forms which must accompany a construction bid and that such documents do not include the plans themselves. This was testified to by Mr. Duley both on his deposition (Dep. 32-33) and in his affidavit in support of the motion for summary judgment (A 104-105).

The evidence submitted by plaintiff on this issue established beyond a shadow of a doubt that the architectural drawings were indeed included by Mr. Laverty in the package sent to National on March 30th. First there was the testimony of Mr. Laverty himself. He testified that he actually remembered receiving the finished plans from the printer on the morning of March 30th (A 210-212), having them wrapped in Wiedersum's mailroom (A 213) and personally taking them to LaGuardia Airport to put them aboard TWA Flight 436 to Indianapolis (A 215-218). This testimony was corroborated by the TWA shipping receipt (PX 12, A 97), the charge slips from Wiedersum's printer (PX 20, A 280-283) and a contemporaneous memorandum made by Mr. Laverty that same day (PX 14, A 99; A 220-223). As Mr. Laverty stated in that memorandum:



"Today, I put the final plans for the Navy Housing project at Charleston, South Carolina, on a plane and sent them directly to National Homes' home office.

"I called earlier and told Mr. Duley that the plans would go on the above day and he said he would have someone there to pick up the plans. I later called to confirm that the plans were on their way.

"This would give National Homes the six (6) days they said they needed to complete their final bid proposal. We will send eight (8) complete sets before April 6, the deadline. According to Floyd Payne, National plans to fly the package to Charleston on the 6th and personally deliver their proposal.

"Presently, finishing touches are being done on the plans, such as titles, etc."

Finally, and even more telling, there was absolutely no evidence that National ever complained to plaintiff that the plans had not been received on March 30th. Neither Mr. Laverty (A 284) nor Mr. Voorneveld (A 314) -- both of whom were in day to day contact with National -- were ever told that the drawings had not been received. Moreover, subsequent to March 30 the parties continued their final preparation of the bid and even went so far as to arrange to have it flown to South Carolina on April 6th:

(1) On April 2nd plaintiff wrote the Department of the Navy requesting that its contractor identification number be assigned to National so as to allow the bid to go in under National's name (PX 15; A 224-225).



(2) On April 3rd plaintiff wrote National advising it of the amount of its fee so that this figure could be incorporated in the bid price (PX 23, A 771; A 312-313).

(3) On April 5th eight additional sets of the plans, as revised to include such items as titles and certain minor details, were delivered to National by air freight (PX 17; A 226-227; A 311-312).

(4) On that same day Mr. Lavery called National to confirm that the plans were "on their way". His contemporaneous memorandum (PX 17, p. 2; A 232-233) states that National will "be there" to pick up the plans and that "on April 6 they will fly plans and proposal to South Carolina."

Defendant's claim that it never received the March 30th plans suffered a terminal blow with the testimony of Mr. Gleason, its former vice president. On the summary judgment motion, both Mr. Payne (the individual responsible for the South Carolina project) and defendant's counsel had submitted affidavits stating that, since the plans had not arrived by April 2nd, Mr. Gleason decided not to submit a bid (A 87, 94). Yet when Mr. Gleason testified at trial, he admitted that National had received the plans that Mr. Lavery



placed on the TWA flight on March 30th (A 428-430, 541-544). It was the collapse of this defense that led to defendant's eleventh-hour attempt to concoct an entirely new and separate defense -- the alleged insufficiency of the plans prepared by Wiedersum. As we show below (Point I, infra), the trial court was clearly correct in holding that defendant's failure to either plead this as an affirmative defense or to refer to it in its interrogatory answers precluded National from raising it at trial.

(5) Defendant's Case

The thrust of defendant's brief is that it was precluded from presenting a proper defense due to the court's ruling that the alleged inadequacy of the plans was not in issue. In point of fact, any problems faced by National in presenting its case to the jury resulted not from the trial court's ruling but from its own trial and pre-trial tactics.

In support of its summary judgment motion, defendant submitted the affidavits of three National executives: James Woolery, an Executive Vice President (A 73), Floyd Payne, a Project General Manager (A 84) and Arvil Duley, an Assistant Secretary (A 104). At trial, only Mr. Duley was called. Although Mr. Woolery had negotiated the initial written agreement between the parties (A 74-75) and had



discussed the New London project with Norman Wiedersum (R 250-263), he was not called. Nor did defendant call Mr. Payne, the individual who had day to day contact with plaintiff on the South Carolina project (A 84), even though he was present in court throughout the trial.

Defendant's reasons for not calling either Mr. Woolery or Mr. Payne are clear: they had completely discredited themselves in their pre-trial testimony. For example in his summary judgment affidavit, Mr. Woolery purported to give a detailed history of the South Carolina project, including the parties' alleged "understanding" that defendant had the unilateral right to make a last-minute decision not to submit a bid and National's alleged reasons for deciding not to bid (A 73-74). Yet Mr. Woolery had testified in his deposition (p. 43-44) that he had nothing whatever to do with this project and had no knowledge of why a bid was not submitted.

Mr. Payne had likewise materially discredited himself before trial. For example, he stated in his summary judgment affidavit that he advised Mr. Gleason that National could not finalize a bid by April 6th due to Wiedersum's failure to submit the plans on time (A 87). That statement was directly contrary to his deposition testimony that the decision not to bid was made solely by Mr. Gleason and that



he was not even informed of the reason for that decision (Dep. 95-103). Moreover his affidavit testimony that National had not received Wiedersum's plans by April 2nd (A 87) was about to be contradicted in front of the jury by Mr. Gleason (see pp. 15-16, supra).

The only one of the above three witnesses to be called was Mr. Duley, through whom counsel attempted to elicit the by-then discredited story that National had not received the plans from Mr. Laverty on March 30th. Yet Mr. Duley no longer expressed such a belief. Backing away from the testimony in his summary judgment affidavit that no plans were received from plaintiff on March 30th (A 104-105), Mr. Duley merely told the jury that he himself did not see the plans and that he did not know whether the plans were in fact received by National (A 653). Furthermore, on cross-examination, Mr. Duley conceded that the March 30th plans would not even have come to him in the first place (A 666).

In short, defendant's problems at trial were entirely of its own making. By including materially untrue statements in the summary judgment affidavits of two of its key witnesses, it had fatally compromised their credibility as potential witnesses. Equally troublesome to defendant was the collapse of the defense that it had intended to



offer through the lips of Mr. Duley -- the alleged non-receipt of the March 30th plans. That defense was clearly not going to stand up against the overwhelming testimony and documentary evidence offered by plaintiff together with the admission of Mr. Gleason that the plans had in fact been received.

That left National with a single defense -- its claim that there had never been an agreement to submit a bid on the South Carolina project and that National had the right to make a unilateral, last-minute decision not to bid. As noted above, however, that defense was totally at odds with the testimony of plaintiff's witnesses, the admissions of defendant's executives and the written documents.

Faced with these insurmountable obstacles, defendant turned on the very eve of trial to a totally new ploy: the construction of a defense based upon the alleged insufficiency of the plans prepared by plaintiff. As we show below, the trial court was perfectly correct in sustaining plaintiff's objections to defendant's repeated attempts to interject this newly-concocted defense into the trial.



POINT I

THE COURT PROPERLY EXCLUDED  
EVIDENCE REGARDING THE ALLEGED  
INADEQUACY OF PLAINTIFF'S PLANS

Defendant's belated assertion that it did not submit a bid on the South Carolina project because plaintiff's plans were inadequate is phony. The lack of merit to this defense is demonstrated by the fact that it was never pleaded or raised in any way during the litigation. Nor is there a single piece of evidence to show that anyone from National ever claimed, prior to trial, that plaintiff had failed to submit adequate plans.

1. The Absence of Any Contemporaneous Evidence  
Regarding This Alleged Defense

The record is barren of any contemporaneous claim that plaintiff's drawings were inadequate. This, more than anything else, shows that this purported defense was concocted solely for purposes of trial.

Plaintiff was in touch with National right up until the very eve of the bidding deadline. During those last few days, there were numerous telephone calls regarding such matters as the amount of Wiedersum's fee (A 312-313), the mechanics for getting the plans into defendant's hands (A 230-231) and the mechanics for getting the completed bid to South Carolina (A 232-233; PX 17, A 101). Yet defendant



cannot point to a single scrap of evidence showing that it ever said that there was anything wrong with the plans.

As plaintiff established at trial, it did not even know that National had failed to submit a bid until some three months later when Mr. Lavery contacted Naval authorities to learn the outcome of the bidding (A 233-234). Upon being advised that no bid had been submitted, Lavery contacted Floyd Payne of National to find out what had happened. Mr. Payne's response was that "they just decided not to submit a proposal" (A 235). As his contemporaneous memorandum of that phone call discloses (PX 18, A 238):

"To FGW: as per our conversation, I called Floyd Payne to find out what happened and why we were not informed. He said they just decided not to submit a price, but he thought that John Gleason notified us. I said that nobody from N.H. contacted our office and that you were upset, because we went to all the expense of pushing the job out and then National Home decides not to put in our proposal."

Nor did Mr. Payne make any reference in his deposition to an insufficiency in Wiedersum's drawings (Dep. 99-100), even though he was the individual in charge of reviewing those plans and putting together the subcontractor prices (A 84; Dep. 72-73). In fact on the only occasion when Mr. Payne identified the reason for National's failure to submit a bid -- in his summary judgment affidavit (A 84) -- he made no mention of any such deficiency. As he said on that occasion (A 87):



"We still had not received the final plans on April 2. When I informed John Gleason of the fact that we did not have the information needed to proceed with the preparation of an intelligent bid, he instructed me to stop all work and said we would not put in a proposal. Eight sets of final plans arrived with a letter from plaintiff dated April 4, 1973, two days before proposals were required to be submitted."

In short, if there was something wrong with Wiedersum's plans, why didn't someone from National say so? Why didn't Mr. Payne or Mr. Gleason say so during their telephone discussions with Lavery and Voorneveld the week of April 2nd? Why didn't Payne say so when Lavery called him three months later to ask why no bid had been submitted? Why didn't Payne say so when asked in his deposition why no bid had been submitted? The absence of any such contemporaneous complaint demonstrates that this contention was the outcome of a frantic search for a defense on the eve of trial.

2. Defendant's Failure to Plead Or Identify  
This Alleged Defense

The pleadings and discovery responses filed by defendant's counsel were equally lacking in any reference to the alleged inadequacy of the plans. For example, National's Answer (A 14) makes no mention of any such defense. In fact the Answer contains but a single affirmative defense -- that plaintiff's claim is barred by the Statute of Frauds (A 16).

Nor can this matter be deemed to have been placed



in issue by any of the denials in the Answer. The only reference in the Complaint to the plans is in paragraph 6, which alleges that Wiedersum "expended great time, labor and effort in preparing plans and specifications for the South Carolina project" and in paragraph 7, which alleges that Wiedersum "sent to National the final plans and specifications for the South Carolina Project" (A 10). Although defendant denied the above portion of paragraph 6, with respect to paragraph 7, it admitted that "on or about April 4, 1973 plaintiff sent to defendant plans and specifications for the South Carolina Project" (A 15). Plainly no issue was raised in the Answer, either directly or indirectly, as to the adequacy of the plans.

When the depositions taken by plaintiff failed to disclose the reasons for defendant's failure to submit a bid, plaintiff served a brief set of interrogatories in an effort to determine what those reasons were. Defendant's answers (A 24-25) were as follows:

"Interrogatory No. 3. State whether a deliberate decision was made by defendant, its officers or its employees not to submit a bid on the Charleston project which is the subject of this litigation.

Answer. Yes.

Interrogatory No. 4. If the answer to Interrogatory 3 is in the affirmative:



(a) State the date on which such a decision was made;

(b) Identify all persons who were involved in such a decision; and

(c) State the reasons for defendant's decision not to submit a bid on the Charleston project.

Answer: (a) On or about April 2, 1973.

(b) The decision was made by John Gleason.

(c) The reasons for the decision not to submit a bid for the Charleston project were the failure of plaintiff to submit plans on time, problems with the soil conditions at the project location and the inability to get bids from subcontractors for necessary land improvement work."

No more straight-forward questions and answers can be imagined. They show that defendant made a decision not to submit a bid on the South Carolina project and that it did so for three reasons: (1) plaintiff's alleged failure to submit plans on time, (2) problems with soil condition and (3) inability to get subcontractor prices for land improvement work. No other reasons are given. If defendant had decided not to submit a bid because of deficiencies in Wiedersum's plans, all it had to do was to say so.

Defendant's attempt to discount the importance of these answers is patently frivolous. It claims (Br. 18)\* that it did not mention the inadequacy of the plans because

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\* References are to Appellant's Brief.



the interrogatory had "nothing whatsoever to do" with whether there was a failure of consideration. This alleged "explanation" is sheer nonsense. The interrogatory had to do with a single question -- the reasons for defendant's failure to submit a bid. If one such reason was that the plans were insufficient (so that there was therefore a failure of consideration), defendant was perfectly free to say so. The fact is that defendant gave three specific reasons for its failure to submit a bid and inadequacy of the plans was not one of them.

The first mention of the alleged inadequacy of the plans came in defendant's trial brief (A 112). That brief was not served on plaintiff until after the jury had been chosen (A 382). Accordingly, prior to the opening of defendant's case, the Court granted plaintiff's motion to preclude the introduction of any evidence relating to this alleged defense (A 385).

3. Defendant Waived The Right To Introduce Evidence Regarding This Alleged Defense

There is no question but that the trial court was correct in excluding all evidence regarding this alleged defense. Under the Federal Rules of Civil Procedure, National's failure to plead this defense in its Answer is a waiver of



its right to raise it at trial. For example, Rule 12(b) provides that:

"Every defense, in law or fact,  
to a claim for relief in any plead-  
ing. . .shall be asserted in the  
responsive pleading thereto. . . ."

Clearly, the argument that the plans prepared by plaintiff were inadequate is a defense "in law or fact". To claim that it is not a defense is to ignore the plain language of the rule.

Even more on point is Rule (8) which provides that the following matters must be set forth as affirmative defenses:

". . .failure of consideration. . .  
and any other matter constituting an  
avoidance or affirmative defense."

It is elementary federal practice that the failure to plead an affirmative defense "results in the waiver of that defense and its exclusion from the case." 5 Wright & Miller, Federal Practice & Procedure, ¶ 1278, p. 339. E.g., Roe v. Sears, Roebuck & Co., 132 F.2d 829 (7th Cir. 1943); Dorsey & Co. v. Banque Nat'l de la Republic D'Haiti, 393 F.Supp. 893 (S.D.N.Y. 1975); United States v. Commercial Union Ins. Group, 294 F.Supp. 768 (S.D.N.Y. 1969).

In the Banque Nat'l case, supra, the plaintiff brokerage house sued defendant bank for its negligence in handling stock certificates transmitted to it for collection.



In defense, the bank argued that plaintiff was contributorily negligent in that the opening of the subject accounts violated certain SEC regulations. In addition, the bank asserted at trial that plaintiff's violation of the regulations constituted an "absolute bar" to any claim against a third party based on the transactions in question. Although the facts constituting this defense were the same as those constituting the contributory negligence defense, Judge Weinfeld held that defendant's failure to plead the "absolute bar" contention as an affirmative defense constituted a waiver of that defense (393 F.Supp. at 897-8).

National's failure to raise this defense in its interrogatory answers is equally fatal. Interrogatories have a clear and meaningful purpose in federal practice. In addition to providing the proponent with factual discovery, they serve to define and narrow the issues for trial. As Professor Moore states:

"In practice, Rule 33 has served a useful purpose in assisting 'to narrow the issues and to enable the interrogating party to ascertain precisely what he will have to meet at trial' 'to ascertain facts and to procure evidence, or secure information as to where pertinent evidence exists and can be obtained'. . . .

"Like the other discovery rules, Rule 33 is to be given a broad and liberal interpretation in the interest of according to the parties the fullest knowledge of the facts, and of clarifying and narrowing the issues." Moore, Federal Practice, ¶ 33.02 at pp. 33-16 to 33-17 (1974 Ed.) (emphasis added).



Here, plaintiff's interrogatories were clearly designed to enable it to ascertain "precisely what it would have to meet at trial" regarding defendant's justification for not submitting a bid. Had the trial court permitted defendant to present evidence beyond the issues raised in its pleadings and interrogatory answers, it would have rendered the Federal Rules meaningless. The statement of the Court in Bernard v. U.S. Aircoach, 117 F. Supp. 134, 137-8 (S.D. Cal. 1953) is particularly apt:

"[W]hen a defendant files an answer verified by one of its corporate officers. . . and signed by its counsel, thereafter engages in extensive discovery procedure covering a period of many months, and goes through pre-trial without urging a highly technical defense and first presents such a claimed defense by a memorandum of law filed with the court after pre-trial, such a tardy litigant has waived its right to urge such a defense. . . ."

Defendant argues (Br. 29-31) that the adequacy of Wiedersum's plans was not an affirmative defense but rather "an element of Wiedersum's affirmative case." This contention is specious. If the adequacy of the plans was an element of plaintiff's case, defendant's remedy would have been to seek dismissal of the Complaint for failure to state a claim. Yet defendant neither pleaded this as an affirmative defense nor moved for a dismissal at trial on this basis.

The agreement between the parties called for Wiedersum to submit architectural drawings for the con-



struction of the South Carolina project. Such drawings cannot arbitrarily be divided into categories of "acceptable" and "unacceptable". As the evidence shows, the plans are evaluated by the Navy on an overall point basis; the higher the points, the better chance the bid has of being accepted (PX 2, A 763). Moreover, the design specifications pursuant to which the South Carolina plans were prepared were voluminous (DX I; A 299-300). Under defendant's theory of the case, plaintiff would have been obligated to go through each page of the specifications and prove affirmatively that the plans complied with every requirement therein. Such a procedure would have turned a five-day trial into a five-month trial.

4. The Court Did Not "Misapply" Its Ruling  
Regarding The Exclusion of This Alleged Defense

Apparently recognizing the propriety of the Court's ruling that the adequacy of the plans was not in issue, National attempts to show that the Court somehow "misapplied" this ruling when it excluded certain evidence which defendant sought to introduce (Br 17-29). Defendant cites two such instances: the halting of a line of questioning pursued with Mr. Gleason and the exclusion of a portion of some notes made by Mr. Mike Bolka. In both instances, it is apparent that defendant was merely attempting to bring in through the back door evidence regarding the alleged inadequacy of the plans.



(1) The Gleason Testimony

Since National had consistently taken the position that the March 30th plans had never been received, plaintiff introduced the plans themselves so as to give visual credence to Mr. Lavery's testimony that he had forwarded them to National (A 211-213). The only testimony bearing even remotely on the contents of these drawings was the explanation by both Mr. Lavery and Mr. Voorneveld as to why a second set of plans had been sent to National on April 5th. They pointed out that the second set contained a few extra details that did not appear on the March 30th set but that there were no substantial differences (A 226-227; 311-312).

At the close of plaintiff's case, defendant's attorneys asked permission to take the two sets of drawings with them for overnight use. After a late night session in Mr. Gleason's hotel room involving himself, Mr. Payne, Mr. Bolka and two of defendant's attorneys (A 510-511), Gleason took the stand the following day and proceeded to go into an intricate page-by-page comparison of the March 30th and April 5th drawings. After several minutes of testimony directed at alleged differences between the two (A 450-457), plaintiff objected to this line of questioning and established, on voir dire, that Mr. Gleason had never gone through the two sets of drawings until the previous evening (A 458-459). At this juncture the Court instructed the jury that Mr. Gleason's testimony was not to be considered for purposes of showing



any alleged deficiency in the drawings but only as it might affect the credibility of Mr. Voorneveld's testimony that the differences between the two sets were negligible (A 462-463).

Defendant proceeded to follow this same line of questioning for several more minutes, working up through page six of the twenty pages of drawings (A 463-473). By that time, it had become obvious that counsel was using Mr. Gleason's testimony as a means of circumventing the Court's earlier ruling on the stricken defense. Thus what was ostensibly being offered for purposes of impeaching the credibility of Mr. Voorneveld was in reality a calculated effort to elicit evidence that the March 30th plans were inadequate. The Court agreed and readily granted plaintiff's motion to terminate this aspect of the examination (A 473-474). Even then, however, defendant was not content to let the matter drop. It persisted -- in the face of repeatedly sustained objections -- in attempting to elicit the same line of testimony as to the remaining fourteen pages of drawings (A 474-482).

Since it had become apparent that defendant was attempting to do more than simply impeach Mr. Voorneveld's testimony, it was well within the trial court's discretion to sustain plaintiff's objection to this portion of Mr.



Gleason's testimony. It has long been the rule that the trial court may exclude otherwise admissible evidence if it is convinced that the prejudice resulting therefrom will outweigh its probative value. Rule 403, Federal Rules of Evidence; Cruz v. United States Line Company, 386 F.2d 803 (2d Cir. 1967); Kilarjian v. Horvath, 379 F.2d 547 (2d Cir. 1967); Reynolds v. Pegler, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); Vockie v. General Motors Corp., 66 F.R.D. 57, 60 (E.D.Pa), aff'd, 523 F.2d 1052 (3rd Cir. 1975).

As was recently said in Belmont Industries, Inc. v. Bethlehem Steel Corp., 62 F.R.D. 697, 706 (E.D. Pa. 1974), aff'd, 512 F.2d 434 (3rd Cir. 1975):

"Assuming that the evidence offered may have been relevant, a trial court may, in the exercise of its sound discretion, exclude such evidence for a variety of reasons. Rule 403 of the proposed Federal Rules of Evidence provides:

Although relevant, evidence may be excluded if its probative rule is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This proposed rule is not new law; it is substantially a restatement of the present law."



(2) The Bolka Notes

Mike Bolka was an employee of National who had been sent to South Carolina on April 2nd, three days after Mr. Laverty had sent the final plans to National, for purposes of obtaining prices from potential subcontractors (A 581; 595-603). During his testimony, defendant attempted to introduce a three-page set of notes made by Mr. Bolka (DX K, A 786). The material listed under the first heading in the notes - Excavation -- discussed the difficulty in obtaining bids for land improvement work. Since this problem was one of the three reasons identified by defendant in its interrogatory answers (A 25), plaintiff made no objection to this portion of the exhibit and it was admitted (A 593).

The balance of the exhibit, however, is replete with references to alleged problems with the "plans" submitted by Wiedersum; they deal with alleged discrepancies between the plans and the Navy criteria and with details which were allegedly omitted from the plans. Obviously, these notes were being offered in an attempt to resurrect the defense that Wiedersum's final plans -- which had been received by National prior to Mr. Bolka's South Carolina trip -- were insufficient.

Defendant sought to justify the admissibility of the notes by asserting (A 587-588) that they applied only to the preliminary site plans (PX 10, A 770) which had been



given to National some four weeks earlier. When plaintiff asked defendant's counsel if he would stipulate that the notes related solely to the preliminary plans given to National on March 6th, counsel refused, stating that Bolka's testimony was clearly limited to the preliminary plans (A 589). Yet when plaintiff attempted to verify this on voir dire, Mr. Bolka was extremely equivocal (A 591-592):

"Q Is it your testimony that any discussion in the memorandum of the plans relates solely to the preliminary plans and has no bearing in any way, shape or form to the final plans that were sent on the 30th or on the 5th?

MR. SIMMONS: Your Honor --

THE COURT: Wait a minute, one at a time.

THE WITNESS: Can you qualify the question? I don't understand it. I really don't understand what you are saying. That relates to the project in South Carolina. The general project of South Carolina.

Q I understand that. Your memorandum relates to the plans and alleged problems with the plans. What I want to know is a simple yes or no, does this memorandum relate solely to the preliminary plans and therefore does not relate to in any way, shape or form to the final plans sent on the 30th and again on the 5th. Is that your testimony?

A The heading on the memorandum, I believe it concerns the South Carolina project. It does not -- and I repeat, it relates to the project itself. Now, if it was a memo concerning plans -- I really don't know It concerns the whole project."



Thus, although counsel claimed that the notes did not relate to the final plans, the jury could have logically viewed the notes as reflecting on those plans. This is especially so since defense counsel was unwilling to stipulate, and Mr. Bolka was unwilling to admit, that the notes were so limited. More importantly, Bolka had testified that his notes were not made until April 2nd, yet this was three days after the March 30th plans had been sent to National. It would only be natural for the jury to infer that any comments Mr. Bolka was making on April 2nd were addressed to the final plans - not preliminary plans that National had received some four weeks earlier. Under these circumstances, the trial court was well within its discretion in refusing to allow the balance of the notes into evidence (see cases cited at p. 32, supra).



## POINT II

THE COURT PROPERLY INSTRUCTED THE JURY  
THAT PLAINTIFF WAS ENTITLED TO A RECOVERY  
IF IT ESTABLISHED INJURY BY VIRTUE OF  
ITS RELIANCE ON DEFENDANT'S CONDUCT  
REGARDING THE EXISTENCE OF AN AGREEMENT

One of the main arguments advanced by defendant throughout the case -- on discovery (Payne Dep. 59), in its summary judgment motion (A 74-75, A 85) and at trial (A 500-501) -- was that the ultimate decision regarding the submission of a bid could never be made until after the final drawings had been prepared and that National had the unilateral right to decide, at that time, not to submit a bid. Plaintiff therefore sought and received an instruction that the jury could find in Wiedersum's favor if it found that defendant's conduct "reasonably led plaintiff to believe" that a bid would be submitted and that plaintiff had "relied" on this conduct by preparing plans for the South Carolina project (A 749). It is doubtful that this instruction played any role in the jury's deliberation since neither side referred to this theory in closing argument (see p. 50, infra).

The instruction was, however, appropriate under the facts of the case. In the first place, defendant was unable to point to a single piece of evidence which would tend to show that National ever asserted the right to make a unilateral, last-minute decision not to bid. All witnesses,



including National's own executives, repeatedly stated that no one at National ever told anyone at Wiedersum that National would not make a final decision until after the drawings had been submitted (R 64, 263; A 241, 495, 498-499; Payne Dep. 61). The most that National could offer was Mr. Gleason's self-serving testimony that he had never committed National to putting in a bid on the South Carolina project (A 399, 415-416).

On the other hand, there was a plethora of evidence from which the jury could find that National's conduct was inconsistent with any alleged right to make a last-minute decision not to bid. For example Mr. Payne -- whose deposition testimony was introduced -- admitted that the decision as to whether to proceed with a project is normally made by National after the pre-proposal conference (A 529-531).

Furthermore Mr. Payne admitted that he understood that National would submit a bid (Dep. 74):

"Q Was it your understanding during this time, between March 6th and March 30th, that a bid was going to be prepared and submitted on this project?

A I was working with that feeling. I didn't particularly have the time, you know, to blow."

Mr. Gleason was likewise operating under the same assumption (A 504):

"Q So that everybody as of February 26th, understood and expected that a bid would be submitted?



A I think I would have to rephrase that and leave out the portion, the word 'understood', I think everybody was in accord that they expected to put in a bid."

Finally, and even more significantly, in the previous New London project, where Nacional made a decision not to submit a bid, that decision was made less than ten days after the parties first began discussing the project, and a full six weeks before the bid was due to be submitted. As Norman Wiedersum testified, the parties first discussed the New London project on June 14, 1971 (R 252-255; PX 27; A 774). On June 15, Mr. James Woolery, National's Executive Vice President, wrote to plaintiff and asked that it not contact anyone at New London "prior to our mutual understanding and agreement to proceed" (R 255-256; PX 28, A 775). He added:

"I will be in touch with you on or before the 25th with our decision. . . ."

On June 24th Mr. Woolery called to advise that Nacional had decided not to bid on the project and that plaintiff could "drop all activity" (R 259-263; PX 30 and 31, A 777-778). This was more than six weeks prior to the bidding deadline of August 11th (PX 29, A 776). Thus defendant's contention, that the decision of whether to submit a bid can never be made until the last minute, was conclusively refuted by its own prior conduct in a project virtually identical to the project in question.



It was clearly proper to instruct the jury that, if it found that plaintiff had reasonably relied on defendant's conduct and that such reliance resulted in the injury complained of, it could return a verdict in favor of plaintiff. Even aside from the doctrine of estoppel, defendant's conduct is evidence of its contractual intention. Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1048-49 (5th Cir. 1971) (applying New York law); Krawez v. Stans, 306 F.Supp. 1230, 1234 (E.D.N.Y. 1969); Stone v. Metropolitan Life Insurance Co., 30 Misc. 2d 729, 219 N.Y.S.2d 386 (Sup. Ct. 1961), rev'd on other grounds, 228 N.Y.S.2d 7 (2nd Dept. 1962), rev'd, 12 N.Y.2d 487, 191 N.E.2d 287 (1963). As the court in the Metropolitan Life Insurance case said (219 N.Y.S.2d at 388):

"This intention to contract is a factual issue . . . the test for which is not the real intention of a party, but rather his conduct which would lead a reasonable man to believe that the party intended to contract (Phillip v. Gallant, 62 N.Y. 256, 263)." (Emphasis added.)

Moreover, the doctrine of promissory estoppel [Restatement of Contracts (2d), §90] has been recognized by the New York courts in a wide variety of commercial cases and is particularly applicable to the facts of this case. Bethlehem Fabricators, Inc. v. British Overseas Airways Corp., 434 F.2d 840 (2d Cir. 1970); Spiegel v. Metropolitan Life Ins. Co., 6 N.Y.2d 91, 160 N.E.2d 40 (1959); Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414



(1923). Bethlehem Fabricators involved a construction company which had entered into a construction contract with defendant BOAC; under the agreement, the contractor was required to post a payment bond in favor of the subcontractors. Plaintiff, in reliance on BOAC's assurance that the construction company would be required to post such a bond, entered into a subcontract for structural steel work. Without informing plaintiff, BOAC decided to dispense with the prime contractor's payment bond. When the contractor went bankrupt and was unable to pay plaintiff, plaintiff sued BOAC. This Court affirmed a jury verdict in favor of plaintiff, holding that BOAC was liable on the basis of both breach of contract and promissory estoppel (434 F.2d at 844).

National contends (Br. 38) that the doctrine of promissory estoppel should be restricted to "charitable subscriptions and insurance cases." Yet in Bethlehem Fabricators, this Court expressly rejected any such limitation (434 F.2d 844):

"Although the defendant claims that gratuitous promises inducing detrimental reliance have not been enforced in New York except in charitable subscription cases, this is not strictly true in the light of the New York cases imposing liability on those who promise that there will be insurance and fail to fulfill that promise. . . .

Since the consequences for Bethlehem of its reliance on BOAC's promise to require a payment bond were potentially as severe as were the consequences in the insurance cases, there is no persuasive reason for distinguishing those cases."



POINT III

THERE WAS SUFFICIENT EVIDENCE TO  
SUPPORT THE JURY'S AWARD OF DAMAGES

The jury was instructed that if it found in favor of plaintiff, it should decide "on the basis of all the evidence, the reasonable value of plaintiff's services in preparing the site and architectural plans for the South Carolina project" (A 751). Defendant took no exception to this charge (A 758). Thus the only question before this Court is whether sufficient evidence was presented to the jury from which it could find that the "reasonable value" of plaintiff's services was \$150,000. Plaintiff's uncontroverted evidence established that the reasonable value of those services was \$208,000. The jury's verdict represents a substantial reduction of that amount.

It is undisputed that National agreed that, in the event it was the successful bidder, Wiedersum's fee would be \$250,000. This figure is set forth in a letter from Albert Voorneveld to John Gleason (PX 23, A 771). Before the letter was sent, Mr. Voorneveld had discussed the matter with Mr. Gleason by phone and Mr. Gleason had no objection to the fee (A 312-313). As Mr. Gleason himself stated (A 540-541):



"Q And did you also, you had tried to talk Mr. Voorneveld down on a fee?

A In a joking manner. I don't think there's ever a fee or quotations ever come into my office, I mean I wouldn't be doing my job if I didn't try to negotiate.

Q But you didn't tell him that National would not accept that fee?

A I think I definitely did not say they would not accept the fee. Absolutely not."

This fee was consistent with the fee the parties had agreed to on the previous Warminster project. On that project, Wiedersum's fee had been set at 5% of the construction cost (PX 24, A 772; A 318). Since National's bid on Warminster was \$4.8 million (PX 2, A 763), Wiedersum's fee would have been \$240,000. National expressed no objection to the amount of the Warminster fee (A 318).

Plaintiff's fee on the South Carolina project was computed by Fred Wiedersum, one of the partners in the firm (A 342). He arrived at the figure \$250,000 by taking 6% of the estimated construction cost (A 343). Although this was 1% higher than the Warminster fee, the difference was due to the expectation that additional work (such as visits to the site during construction) would be required in the event that National was awarded the bid (A 344). Since this additional work was never performed, Mr. Wiedersum agreed that the extra 1% should be deducted



from the amount due on the work which had been performed prior to National's breach (A 344-345). This resulted in a reduction of \$42,000 from the fee which was originally established (A 345).

Mr. Wiedersum further testified -- without contradiction -- that a percentage fee is the customary manner of computing architect's fees in large construction projects. He testified that his firm is involved primarily in large construction projects and that, in "99.9 per cent" of those projects, the fee is on a percentage basis (A 347-348). The minimum fee recommended by the trade for a project of this nature is 5.5% (A 345-346).

It is ironic that defendant claims that the only evidence regarding plaintiff's actual "expenses" on the South Carolina project showed costs of \$6,556.02 (Br. 44). Plaintiff made no attempt to prove the actual out-of-pocket costs on this project; on the contrary, its only showing with respect to damages was that set forth above -- the reasonable and customary amount of its fee for the services it performed under its agreement with defendant. The \$6,556.02 merely represents defendant's counsel's own incomplete attempt to ascertain plaintiff's out-of-pocket costs (A 378-379, 744).

Furthermore, Mr. Wiedersum explained the irrelevance of his firm's time cards, from which defendant took its incomplete summary of expenses. As he testified, plaintiff



maintains time cards not for billing purposes but for administrative purposes -- such as analyzing whether the firm's personnel are spending too much time on a project (A 346). He stated that the number of times plaintiff has billed a client on the basis of time cards is minimal (A 346-347):

"Q Do you ever bill a job on the basis of the time cards?

A Only where the job would be very small, where a percentage would be very unreasonable and the client wouldn't accept it."

Defendant also argues (Br. 46) that plaintiff should be entitled to no damages since, under the contract, it was not entitled to a fee unless National was the successful bidder. This simply amounts to an argument that the Court improperly instructed the jury that plaintiff was entitled to damages on the basis of the reasonable value of the services it performed prior to National's breach. As noted above, defendant took no exception to that instruction. It is, therefore, precluded from raising this issue on appeal. Rule 51, Fed. R.Civ. P.; Cohen v. Franchard Corp., 478 F.2d 115, 122 (2d Cir.), cert. denied, 414 U.S. 857 (1973); United States v. Heyward-Robinson Co., 430 F.2d 1077, 1083-4 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971); Marx & Co., Inc. v. Diners' Club, Inc., 400 F.Supp. 581, 585 (S.D.N.Y. 1975).



Moreover, the Court's instruction was clearly correct. The New York courts have repeatedly held that a contractor is entitled to compensatory damages for his part performance of a contract which has been unlawfully terminated by the defendant, even though the contractor is unable to ascertain the profits he would have gained had the contract been performed. Griffen v. Sprague Electric Co., 115 Fed. 749 (S.D.N.Y. 1902); Long Island Contracting & Supply Co. v. City of New York, 204 N.Y. 73, 81-82, 97 N.E. 483, 486 (1912); Peru Associates, Inc. v. State of New York, 70 Misc.2d 775, 334 N.Y.S.2d 772 (Ct. of Claims 1971), aff'd, 39 A.D.2d 1018, 335 N.Y.S.2d 373 (3rd Dept. 1972); Clement S. Crystal, Inc. v. Denberg, 237 N.Y.S.2d 102 (N.Y. Co. 1962).

The fact that plaintiff might not have been entitled to any fee if National had fully performed the contract is irrelevant. National, by breaching the agreement, lost its right to rely on the terms of the agreement regarding plaintiff's fee. This point is graphically illustrated by Hunter v. Vicario, 146 App. Div. 93, 130 N.Y.Supp. 625 (1st Dept. 1911), the facts of which are virtually identical to the case at bar. Plaintiff architect had been engaged to prepare plans for the alteration of defendant's building. However, plaintiff was only to be awarded a fee if he could have the work accomplished, through subcontractors that he would engage, cheaper



than the lowest bid submitted by a general contractor for the entire job. In that event, his fee was to be one-half the difference between the total cost paid to the subcontractors and the lowest bid price. After bids for the overall project had been received, but before plaintiff had completed the pricing for all of the subcontractors, defendant abandoned the project and refused to pay plaintiff for his services.

Although the Appellate Division affirmed the dismissal of the architect's claim for lost profits, it held that he was entitled to recover the reasonable value of his services in preparing the plans and specifications. The court further held that his recovery was properly based upon "the customary and usual charge" for drawing the plans--in that case, 6% of the proposed cost of alteration (130 N.Y. Supp. at 627). The court deemed irrelevant the fact that, under the agreement, plaintiff's fee was contingent (Id. at 627-8):

"The rule is that where a special agreement for services has been performed in part by plaintiff, and its further performance has been prevented by the act of the defendant, who has repudiated same and refused to continue to perform, the plaintiff may at his option either sue for the breach and recover damages, or abandon the contract altogether, repudiate it because of defendant's repudiation, and recover under quantum meruit."



POINT IV

THE MISCELLANEOUS ASSIGNMENTS OF  
ERROR ASSERTED BY DEFENDANT ARE  
WITHOUT MERIT

A. Submission of the Complaint to the Jury

The only error regarding the "admissability" of the pleadings was made by defendant's counsel, not by the Court. That error was National's attempt to have the Complaint physically submitted to the jury as an exhibit, which is clearly improper, rather than reading the relevant portions of it to the jury, which obviously would have been permissible. As the transcript shows, the Court only prohibited defendant from submitting the Complaint; at no point did it prohibit counsel from reading to the jury from it.

At the conclusion of National's case, defendant's counsel asked "that the complaint and our answer be deemed admitted into evidence" (A 667). The Court sustained plaintiff's objection, pointing out that it was "not customary" and that the pleadings "are not marked in evidence", although they are "always before any Court" (Ibid.). Likewise, during summation, defendant stated (A 707): "You will have the pleadings in front of you --". Plaintiff promptly objected (Ibid.):



"I object to that, the jury doesn't take pleadings into the jury room. If Mr. Simmons wants to read from them that's one thing, but they are not in the record."

Notwithstanding the hint that counsel could properly "read" the Complaint to the jury, defendant let the matter drop.

The Court's refusal to allow the pleadings to be submitted to the jury was proper. E.g., Roscoe Lumber Co. v. Standard Silica Co., 62 App. Div. 421, 70 N.Y.Supp. 1130 (2nd Dept. 1901); Rubinstein v. Sark Co., 36 N.Y.S.2d 311, 313 (City Ct. 1942). In fact, the courts have frequently held that submission of the pleadings to the jury constitutes reversible error. E.g., Dzulvelis v. Mays Fur & Ready To Wear, 18 N.Y.S.2d 106 (App.T.2d Dept. 1939); see Pescara v. Hanson Chemists, Inc., 122 N.Y.S.2d 848 (App.T. 1st Dept. 1953).

B. The Claim That The Instructions Were Irreconcilable

National claims that the Court's instructions were so "conflicting" and "irreconcilable" that it was denied a fair trial (Br. 39-44). As it concedes, however, it made no such objection at trial. When asked for its exceptions, defendant merely objected to two specific instructions (A 758-759). It made no mention of any alleged deficiency or inconsistency in the overall charge. Under Rule 51, Fed.R.Civ.P., any such objection must be made before the jury retires:



"\* \* \* No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.\* \* \*"

This Court has repeatedly held that the failure to object to the charge at trial precludes any consideration of such a claim on appeal. Cohen v. Franchard Corp., 478 F.2d 115, 122 (2nd Cir.), cert. denied, 414 U.S. 857 (1973); United States v. Heyward-Robinson Co., 430 F.2d 1077 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971); Marx & Co., Inc. v. Diners Club, Inc., 400 F. Supp. 581 (S.D.N.Y. 1975). As was said in Heyward-Robinson (430 F.2d at 1084):

"The purpose of this provision is to prevent reversals and consequent new trials because of errors the judge might well have corrected if the point had been brought to his attention."

The necessity of a timely objection is particularly applicable where, as here, the claim is that the charge as a whole is "conflicting" and "irreconcilable". Neither of the two objections made by defendant (A 758-759) indicated that counsel was dissatisfied with the instructions as a whole. If counsel felt that the instructions contained inconsistencies, they should have been brought to the Court's attention in order to give it, and counsel, an opportunity to correct them. Having elected not to make this claim at trial, defendant is clearly foreclosed from raising it on appeal.



C. Failure To Advise Counsel of Instructions Before Summation

Defendant was in no way prejudiced by the Court's failure to advise counsel, prior to summation, of the instructions which it proposed to give. As noted above, National only excepted to two portions of the Court's instruction: that the adequacy of the plans was not in issue and the instruction on promissory estoppel.

Defendant can scarcely claim to have been surprised by the Court's instruction that the adequacy of the plans was not in issue. The Court had so ruled on numerous occasions during the course of the trial. By the time of summation, there was simply no question in anyone's mind that this matter was not at issue.

Nor was National prejudiced by the Court's failure to advise that it would give an instruction on promissory estoppel. Since the Court had not indicated its intention in this regard, plaintiff made no mention of the theory of promissory estoppel in its closing. Plaintiff simply focused its argument on the existence of an agreement between the parties to prepare and submit a bid on the South Carolina project (A-730-739). In fact, the only mention of defendant's "conduct" (the basis for an estoppel argument) was in connection with plaintiff's



argument that it "confirms the existence of [the] agreement" (A 734).

In view of plaintiff's election not to argue promissory estoppel to the jury and in view of the overwhelming evidence of an agreement which was before the jury, it is apparent that the jury based its verdict on a finding that there had been an agreement between the parties. Thus defendant was not prejudiced by the Court's failure to advise of its proposed instruction on promissory estoppel and the Court's non-compliance with Rule 51 was harmless error. Williams v. Independent News Co., Inc., 485 F.2d 1099, 1106 (3rd Cir. 1973); Vitarelle v. Long Island Rail Road Co., 415 F.2d 302, 304 (2d Cir. 1969); Hardigg v. Inglett, 250 F.2d 895, 897 (4th Cir. 1957); Gwinett v. Albaltross S.S. Co., 243 F.2d 8, 9-10 (2d Cir. 1957). As this court said in the Vitarelle case (415 F.2d at 304):

"[T]he charge the judge gave was a routine F. E. L. A. charge, and was in no particular erroneous. Plaintiff has failed to show that he was prejudiced in any way by the Court's failure to comply with Rule 51."



CONCLUSION

For all of the reasons set forth above, the judgment in favor of plaintiff should be affirmed.

Respectfully submitted

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Attorneys for Plaintiff-Appellee



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

FREDERIC P. WIEDERSUM ASSOCIATES,

against

NATIONAL HOMES CONSTRUCTION  
CORPORATION,

Plaintiff-  
Appellee

Defendant-  
Appellant

Index No. 76-7021

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

Orlando Hernandez

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

502 57th Street, Brooklyn, N.Y.

That on the 29th day of April 19 76 at 1 Chase Manhattan Plaza  
New York, New York

deponent served the annexed Brief for Plaintiff-Appellee

upon

Harry L. Simmons, Esq. of  
Milbank, Tweed, Hadley & McCloy

the attys for Defendant-Appellant in this action by delivering 2 copies  
personally. Deponent knew the person so served to be the person mentioned and described in said papers  
as the attys for Defendant-Appellant herein,

HELEN A. STRADER  
NOTARY PUBLIC, State of New York  
No. 41-9212370  
Sworn to before me this 29th  
day of April 19 76  
in Queens County  
Certificate filed in New York County  
Commission Expires March 30, 1978  
Helen A. Strader

Orlando Hernandez  
Print name beneath signature  
ORLANDO HERNANDEZ